



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

AUG 28 2007

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Stefan H. Gleason
National Right to Work Legal Defense
and Education Foundation, Inc.
8001 Braddock Road
Springfield, Virginia 22160

RE: MURs 5403 & 5466

Dear Mr. Gleason:

On March 7, 2007, you were notified that the Federal Election Commission severed allegations pertaining to America Coming Together from MUR 5612 and merged that portion of the matter into ongoing investigations previously designated as MURs 5403 and 5466. The Commission found that there was reason to believe America Coming Together and Carl Pope, as treasurer ("ACT"), and Joint Victory Campaign 2004 and Janice Ann Enright, as treasurer ("JVC"), violated 2 U.S.C. §§ 434, 441a(f) and 441b(a), provisions of the Federal Election Campaign Act of 1971, as amended ("FECA"), and 11 CFR §§ 102.5, 104.10, 106.1 and 106.6, and conducted an investigation in these matters. On August 23, 2007, a conciliation agreement signed by America Coming Together and Carl Pope, in his official capacity as treasurer, was accepted by the Commission. Also on this date, the Commission determined to take no further action as to Joint Victory Campaign 2004 and Janice Ann Enright, in her official capacity as treasurer.

In addition, on March 6, 2007, the Commission found no reason to believe that John Kerry for President, Inc. and Robert A. Farmer, in his official capacity as treasurer, and DNC Services Corporation/Democratic National Committee and Andrew Tobias, in his official capacity as treasurer, violated FECA with respect to allegations they coordinated expenditures with ACT. The Commission took no action against ACT on these allegations. Accordingly, on August 23, 2007, the Commission closed the files in these matters.

Documents related to these cases will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). A copy of the agreement with America Coming Together and Carl

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Pope is enclosed for your information. The Factual and Legal Analysis concerning the coordination findings is also enclosed.

If you have any questions, please contact me at (202) 694-1650.

Sincerely,

A handwritten signature in black ink, appearing to read "Peter G. Blumberg", with a stylized flourish at the end.

Peter G. Blumberg
Attorney

Enclosures
Conciliation Agreement
Factual and Legal Analysis

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1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

3
4 RESPONDENTS: America Coming Together and Carl Pope MURs:5403/5466
5 as Treasurer
6 John Kerry for President, Inc. and Robert Farmer,
7 as Treasurer
8 DNC Services Corporation/Democratic National
9 Committee and Andrew Tobias, as Treasurer
10
11
12

13 **I. INTRODUCTION**

14 This matter was generated by two complaints filed with the Federal Election
15 Commission ("the Commission") by Democracy 21, the Campaign Legal Center, and the
16 Center for Responsive Politics, which were designated as MURs 5403 and 5466. The
17 complaints alleged, among other things, that John Kerry for President, Inc. and Robert A.
18 Farmer, in his official capacity as treasurer, (the "Kerry Committee") and DNC Services
19 Corporation/Democratic National Committee and Andrew Tobias, in his official capacity as
20 treasurer, (the "DNC") violated the Act by receiving excessive in-kind contributions via
21 coordinated expenditures with America Coming Together. On September 29, 2004 the
22 Commission found that there was reason to believe that America Coming Together and Carl
23 Pope, in his official capacity as treasurer, ("ACT") may have violated the Federal Election
24 Campaign Act of 1971, as amended ("FECA"), by making excessive contributions to the
25 Kerry Committee in the form of coordinated expenditures through a common vendor. At that
26 time, the Commission did not make any findings with respect to possible coordination of
27 ACT expenditures with the DNC.

28 Following the investigation, which produced substantial information about the roles
29 of the individuals involved but no credible evidence that any coordination occurred, the

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Commission took no further action with respect to allegations that ACT made coordinated expenditures resulting in excessive in-kind contributions to the Kerry Committee or the DNC. The Commission also found that there was no reason to believe that the Kerry Committee or the DNC violated the Act by receiving excessive in-kind contributions from ACT via coordinated expenditures.

II. FACTUAL AND LEGAL ANALYSIS

The allegations of coordination of ACT expenditures with the Kerry Committee were based primarily on information relating to the role of a "former employee" - Jim Jordan - who served successively as an agent of both organizations, and the role of a "common vendor" - the Dewey Square Group ("DSG") - that served simultaneously as the agent of both organizations. Further, the revelation that Harold Ickes, chief of staff for ACT, had simultaneously served on the Executive Committee of the DNC prompted an analysis of potential coordination between ACT and the DNC.

A. Jim Jordan Did Not Coordinate ACT Expenditures with the Kerry Committee Under a Former Employee Theory

James Jordan, who had worked for the Kerry Committee as its campaign manager during most of 2003, began doing press relations and issues research for ACT in January 2004, through a consulting firm called The Thunder Road Group. *See Declaration of James Jordan at ¶¶ 2-3.* This sequence raised the prospect that some portion of ACT's communications could have been coordinated with the Kerry Committee, based on the "former employee" conduct standard. *See 11 C.F.R. § 109.21(d)(5) (2004).* A finding of coordination would require that: (1) Mr. Jordan used or conveyed information as the Kerry Committee's "campaign plans, projects, activities, or needs" to ACT; and (2) this particular information was "material to the creation, production, or distribution of" an ACT public

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1 communication. *See* 11 C.F.R. § 109.21(d)(5)(ii) (2004). The Commission's investigation
2 has not produced evidence of facts that would support this conclusion.

3 First, Mr. Jordan's employment with the Kerry Committee was terminated on
4 November 9, 2003, which was before any primary election or caucus, and several months
5 before ACT effectively began the bulk of its voter identification activities for the November
6 general election.¹ In his declaration, Mr. Jordan states that he was aware of the Kerry
7 Committee's plans, projects, activities, and needs only before November 9, 2003—at a time
8 when the campaign was solely focused on winning the January 2004 Iowa caucus and New
9 Hampshire primary. *See* Declaration of James Jordan at ¶¶ 2-3 (May 2, 2005). Mr. Jordan
10 states that, during his tenure, the Kerry Campaign did not "undertake planning for either the
11 general election or for the phases of the primary campaign after Sen. Kerry became the
12 putative nominee due to victories he would have to achieve in the early primaries...." *Id.* at
13 ¶ 6. Moreover, it was only on the day that John Kerry dismissed him that Mr. Jordan first
14 learned of the candidate's intention to forego federal matching funds, a decision upon which
15 none of the campaign's strategy had been based. *Id.* at ¶ 11.

16 Second, Mr. Jordan had no direct involvement in ACT's communications to the
17 general public. He began working for ACT in January 2004, serving as press spokesman and
18 focusing primarily on communications with the media and research support. *Id.* at ¶¶ 18-19.
19 However, Mr. Jordan did not develop the ideas or write the scripts for direct mail, canvass
20 script, newspaper or Internet public communications. *Id.* at ¶¶ 23, 25-28.

¹ The Commission recently reduced the temporal limit in the former employee conduct standard from the current election cycle to 120 days. 11 C.F.R. § 109.21(d)(5)(i) (2006); *see* Coordinated Communications, 71 Fed. Reg. 33,190, 33,204-5 (June 8, 2006) ("both national and local events tend to render campaign plans and strategy obsolete on a very rapid basis").

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1 Finally, a review of ACT and Kerry Committee discovery responses and document
2 productions supports Mr. Jordan's testimony that he transmitted no information about the
3 Kerry Committee's plans, projects, activities to ACT that could have been deemed material
4 to the creation of any ACT communications. *See Id.* at ¶¶ 25-29.

5 In summary, the investigation revealed that Mr. Jordan appeared to lack relevant
6 current information about the Kerry Committee's plans, was not directly involved in ACT's
7 ad campaign, and did not appear to have conveyed any material information to ACT
8 regarding the Kerry Committee's plans, projects, activities, or needs. Therefore, the
9 Commission found there was no reason to believe that the Kerry Committee received
10 excessive in-kind contributions from ACT and determined that it would take no further
11 action with respect to ACT.

12 **B. The Dewey Square Group Did Not Coordinate ACT Expenditures**
13 **with the Kerry Committee under a "Common Vendor" Theory**
14

15 DSG is a political consulting firm that managed voter turnout for the Kerry campaign
16 at various points in 2004, and also has ran a phone bank operation for ACT. This sequence
17 raised the prospect that some portion of ACT's communications could have been coordinated
18 with the Kerry Committee, based on the "common vendor" conduct standard. *See* 11 C.F.R.
19 § 109.21(d)(4) (2004). A finding of coordination would require that: (1) DSG used or
20 conveyed information as the Kerry Committee's "campaign plans, projects, activities, or
21 needs" to ACT; and (2) this particular information was "material to the creation, production,
22 or distribution of" an ACT public communication. *See* 11 C.F.R. § 109.21(d)(4)(ii) (2004).
23 The Commission's investigation has not produced evidence of facts that would support this
24 conclusion.

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1 Based on affidavit submitted by Charles Baker, a DSG principal, it appears that DSG
2 created two separate joint venture entities, one of which (Dewey Hub LLC) provided services
3 to Kerry Committee, DNC and other federal candidates and committees and the other of
4 which (Active Calls LLC) provided services to non-candidate and non-party groups, such as
5 ACT. See Declaration of Charles Baker at ¶¶ 3-4. These entities were structured and staffed
6 separately for the purpose of advising clients on strategic decisions such as content, targeting
7 and timing of phone services. *Id.* at ¶ 4.

8 DSG and Active Calls established internal procedures to prevent work done by Active
9 Calls LLC for ACT from being coordinated with work being done for the Kerry Committee
10 by Dewey Hub LLC. *Id.* at ¶¶ 5, 15-26. Under these guidelines, the Active Calls staff was
11 not provided with information about the plans, projects or needs, activities or any other
12 nonpublic information concerning the operations of Dewey Hub LLC (including the Kerry
13 Committee). *Id.* Decisions about the content of telephone scripts or messages for ACT's
14 automated call programs were made solely by ACT, and based on information derived from
15 ACT's own internal research and polling. *Id.* at ¶ 21.

16 Minyon Moore, a principal of DSG, served on the ACT Board of Directors and
17 provided ACT with consulting services for political strategy and message development from
18 approximately November 2003 to September 2004. *Id.* at ¶¶ 6-10. During the term of her
19 work with ACT, Ms. Moore did not participate in any of the DSG activities on behalf of the
20 Kerry Committee, did not attend any meetings about or related to the Kerry Campaign, or
21 engage in any communications about the Kerry Campaign with any Kerry Campaign
22 officials, staff or consultants, including DSG staff who were working with the Kerry
23 Campaign. *Id.* at ¶ 12. In fact, the contract between DSB and ACT included specific

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1 language requiring DSG and Ms. Moore to maintain as confidential any information that was
2 learned as a result of her consulting with ACT. *Id.* at ¶ 11.

3 In sum, the investigation revealed that DSG personnel who had access to relevant
4 current information about the Kerry Committee's plans were effectively isolated from the
5 DSG personnel involved in ACT's ad campaign, and therefore did not seem to have
6 conveyed any material information to ACT regarding the Kerry Committee's plans, projects,
7 activities, or needs. Thus, the Commission found there was no reason to believe that the
8 Kerry Committee received excessive in-kind contributions from ACT via coordinated
9 expenditures and the Commission determined to take no further action with respect to ACT.

10 C. **Harold Ickes Did Not Coordinate ACT Expenditures with the DNC**
11

12 Harold Ickes's contemporaneous involvement with both the DNC and ACT raised the
13 possibility that some of ACT's communications could have been coordinated with the DNC,
14 based on the "material involvement," "request or suggestion," or "substantial discussion"
15 conduct standards. *See* 11 C.F.R. § 109.21(d)(1)-(3) (2004). However, the evidence
16 obtained in the Commission's investigation did not support a theory of coordination based on
17 the conduct of Mr. Ickes.

18 Mr. Ickes has served the DNC in both formal and informal ways. Since 2001 he has
19 served on its Executive Committee, which is responsible for the "conduct of the affairs" of
20 the DNC. Since the mid-1990's Mr. Ickes has served on its Rules and Bylaws Committee,
21 which is responsible for "receiv[ing] and consider[ing] all recommendations for adoption and
22 amendments to" the rules and bylaws of the DNC and to the Charter of the Democratic Party.
23 Charter at 16.

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1 Notwithstanding his roles, the testimony and documents obtained in the investigation
2 demonstrate Mr. Ickes was never involved in the DNC's efforts to create or produce its own
3 advertising in 2003-4. Furthermore, the testimony and the documents indicate that he did not
4 seek or obtain any material information about such efforts.

5 The investigation did not show coordination based on Mr. Ickes's conduct. As chief
6 of staff of ACT, Mr. Ickes directed that organization's overall efforts to produce dozens of
7 print advertisements. However, the documentary evidence and testimony demonstrate that in
8 his roles at the DNC, Mr. Ickes was not involved in that organization's communications.
9 Moreover, the documentary evidence and testimony demonstrate that the content and
10 placement (*i.e.*, markets, timing, frequency or duration) of ACT's communications were in
11 no way influenced by the DNC. Therefore, there was not a basis to conclude that ACT made
12 coordinated communications based on the "material involvement" conduct standard under
13 section 109.21(d)(2).

14 Moreover, the discovery from ACT, Mr. Ickes' consulting firm (The Ickes & Enright
15 Group), and the DNC reveal no discussions or requests from the DNC relating to the
16 production of ACT's communications. Therefore, the evidence did not support a finding that
17 ACT made coordinated communications under the "request or suggestion" or "substantial
18 discussion" standards of sections 109.21(d)(1) or (3).

19 Finally, there is no evidence that Mr. Ickes was an "agent" of the DNC who, under
20 the regulations, had the authority to perform certain actions related to the creation,
21 production, or distribution of communications.² See 11 C.F.R. §§ 109.3 and 109.21(d)(2).

² A conclusion that ACT made a coordinated communication for the benefit of the DNC is not solely dependent on a determination that Mr. Ickes is an "agent" of the DNC. See 11 C.F.R. § 109.21(d)(2). For purposes of a national political party committee, under the coordination regulations, an "agent" is defined as "any person who has actual authority, either express or implied, to engage in any of the following activities...:

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1 As noted above, Mr. Ickes's formal role as a member of the Executive Committee was
2 limited to the general conduct of the affairs of the DNC, and not its communications.
3 Similarly, the testimony and documents demonstrate that his informal work at the DNC did
4 not involve the creation, production, or distribution of the messages that the DNC sought to
5 communicate to the public.

6 As a result of the findings yielded by the investigation, the Commission found there
7 was no reason to believe that the DNC received coordinated in-kind contributions from ACT,
8 and took no further action with respect to allegations that ACT made excessive contributions
9 in the form of coordinated expenditures.

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- (1) To request or suggest that a communication be created, produced, or distributed.
 - (2) To make or authorize a communication that meets one or more of the content standards set forth in 11 CFR 109.21(c).
 - (3) To create, produce, or distribute any communication at the request or suggestion of a candidate.
 - (4) To be materially involved in decisions regarding: (i) The content of the communication; (ii) The intended audience for the communication; (iii) The means or mode of the communication; (iv) The specific media outlet used for the communication; (v) The timing or frequency of the communication; or, (vi) The size of prominence of a printed communication, or duration of a communication by means of broadcast, cable, or satellite
 - (5) To make or direct a communication that is created, produced, or distributed with the use of material or information derived from a substantial discussion with a candidate.